

110TH CONGRESS  
2D SESSION

# H. R. 6426

To prohibit the use of funds by the Department of Defense on the KC–X tanker contract, and for other purposes related to that contract.

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## IN THE HOUSE OF REPRESENTATIVES

JUNE 26, 2008

Mr. TIAHRT (for himself, Mr. MORAN of Kansas, Mr. SHIMKUS, Mr. REICHERT, and Mr. LAHOOD) introduced the following bill; which was referred to the Committee on Armed Services

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## A BILL

To prohibit the use of funds by the Department of Defense on the KC–X tanker contract, and for other purposes related to that contract.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the  
5 “KC–X Tanker Recompete Act”.

6 (b) TABLE OF CONTENTS.—The table of contents for  
7 this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. KC–X Tanker contract.
- Sec. 3. Independent cost estimate.

- Sec. 4. Requirement to offset illegal subsidization to foreign persons participating in KC-135 replacement competition.
- Sec. 5. Ensuring fair competition.
- Sec. 6. National security considerations.
- Sec. 7. Industrial base considerations.
- Sec. 8. Loss of employee tax revenue.
- Sec. 9. Loss of corporate tax revenue.
- Sec. 10. Regulatory burden.
- Sec. 11. Foreign Corrupt Practices Act.
- Sec. 12. Covered contractor definition.
- Sec. 13. Report.

**1 SEC. 2. KC-X TANKER CONTRACT.**

2 (a) PROHIBITION.—No funds may be used by the De-  
 3 partment of Defense on the KC-X tanker contract. In this  
 4 subsection, the term “KC-X tanker contract” means the  
 5 contract awarded by the Department of the Air Force on  
 6 February 29, 2008, for the next generation air-refueling  
 7 tanker aircraft.

8 (b) REPLACEMENT.—If the Department of the Air  
 9 Force chooses not to exercise its authority to award a new  
 10 contract for the KC-X tanker to the bidder whose protest  
 11 of the February 29, 2008, award was sustained by the  
 12 Government Accountability Office on June 18, 2008, the  
 13 Secretary of Defense, using competitive procedures, shall  
 14 award a contract for a replacement for the KC-135 tank-  
 15 er. Such funds as may be necessary are authorized to con-  
 16 duct the competition for such contract.

**17 SEC. 3. INDEPENDENT COST ESTIMATE.**

18 As part of the acquisition process for the award of  
 19 a contract for a replacement for the KC-135 tanker, as  
 20 required by section 2(b), the Secretary of Defense and the

1 source selection authority shall ensure that an inde-  
2 pendent cost estimate is completed. The cost estimate  
3 shall include an estimate of—

- 4 (1) all costs borne by the suppliers;
- 5 (2) all costs borne by foreign governments;
- 6 (3) all costs borne by domestic suppliers (if the  
7 proposal involves any domestic suppliers); and
- 8 (4) all costs covered by cost accounting stand-  
9 ards under the Federal Acquisition Regulation.

10 **SEC. 4. REQUIREMENT TO OFFSET ILLEGAL SUBSIDIZA-**  
11 **TION TO FOREIGN PERSONS PARTICIPATING**  
12 **IN KC-135 REPLACEMENT COMPETITION.**

13 (a) REQUIREMENT.—As part of the acquisition proc-  
14 ess for the award of a contract for a replacement of the  
15 KC-135 tanker, as required by section 2(b), the Secretary  
16 of Defense shall, in conducting the cost or price evaluation  
17 of any proposal submitted by a subsidized person, increase  
18 the cost or price of the proposal by the amount of illegal  
19 subsidization.

20 (b) ILLEGAL SUBSIDIZATION.—For purposes of sub-  
21 section (a), the amount of illegal subsidization with re-  
22 spect to a proposal submitted by a subsidized person is  
23 the amount of the illegal subsidy referred to in subsection  
24 (c), as determined jointly by the Secretary of Commerce  
25 and the United States Trade Representative after receipt

1 of a request from the Secretary of Defense for such a de-  
2 termination.

3 (c) SUBSIDIZED PERSONS.—With respect to any pro-  
4 posal submitted to the Department of Defense for a con-  
5 tract for a replacement of the KC-135 tanker, a sub-  
6 sidized person is any of the following:

7 (1) FOREIGN PERSON.—A foreign person to  
8 which the government of a foreign country that is a  
9 member of the World Trade Organization has pro-  
10 vided a subsidy for the tanker if—

11 (A) the United States has requested con-  
12 sultations with that foreign country under the  
13 Agreement on Subsidies and Countervailing  
14 Measures on the basis that the subsidy is an il-  
15 legal subsidy under that Agreement; and

16 (B) the World Trade Organization has  
17 ruled that the subsidy provided by the foreign  
18 country is an illegal subsidy under the Agree-  
19 ment on Subsidies and Countervailing Meas-  
20 ures.

21 (2) JOINT VENTURES.—Any joint venture, co-  
22 operative organization, partnership, or contracting  
23 team of which a foreign person described in para-  
24 graph (1) is a member.

1           (3) SUBCONTRACTS.—Any person proposing to  
2       use a foreign person described in paragraph (1) or  
3       an entity described in paragraph (2) as a subcon-  
4       tractor in performing the contract for which the pro-  
5       posal is submitted.

6       (d) DEFINITIONS.—In this section:

7           (1) The term “Agreement on Subsidies and  
8       Countervailing Measures” means the agreement de-  
9       scribed in section 101(d)(12) of the Uruguay Round  
10      Agreements Act (19 U.S.C. 3501(d)(12)).

11          (2) The term “illegal subsidy” means a prohib-  
12      ited subsidy or an actionable subsidy under the  
13      Agreement on Subsidies and Countervailing Meas-  
14      ures.

15          (3) The term “foreign person” means—

16              (A) an individual who is not a United  
17              States person or an alien lawfully admitted for  
18              permanent residence into the United States; or

19              (B) a corporation, partnership, or other  
20              nongovernmental entity which is not a United  
21              States person.

22          (4) The term “United States person” means—

23              (A) a natural person who is a citizen of the  
24              United States or who owes permanent alle-  
25              giance to the United States; and

1 (B) a corporation or other legal entity  
2 which is organized under the laws of the United  
3 States, any State or territory thereof, or the  
4 District of Columbia, if natural persons de-  
5 scribed in subparagraph (A) own, directly or in-  
6 directly, more than 50 percent of the out-  
7 standing capital stock or other beneficial inter-  
8 est in such legal entity.

9 (5) The term “cost or price evaluation” means  
10 an evaluation conducted by a source selection au-  
11 thority pursuant to subpart 15.305(a)(1) of the Fed-  
12 eral Acquisition Regulation.

13 **SEC. 5. ENSURING FAIR COMPETITION.**

14 As part of the acquisition process for the award of  
15 a contract for a replacement for the KC-135 tanker, as  
16 required by section 2(b), the Secretary of Defense and the  
17 source selection authority shall ensure that any covered  
18 contractor, foreign or domestic, for the contract, as part  
19 of the cost criteria, is evaluated both on the cost borne  
20 by the supplier and any cost borne by a foreign govern-  
21 ment that is not borne by a government (local, State, or  
22 Federal) in the United States. The costs considered in the  
23 evaluation shall be consistent with the costs estimated in  
24 the independent cost estimate completed pursuant to sec-  
25 tion 3.

1   **SEC. 6. NATIONAL SECURITY CONSIDERATIONS.**

2       As part of the acquisition process for the award of  
3 a contract for a replacement for the KC-135 tanker, as  
4 required by section 2(b), it is the responsibility of the De-  
5 partment of Defense to take into consideration the na-  
6 tional security impacts, the industrial base impacts, and  
7 the economic impact to the United States of awarding con-  
8 tracts for critical capabilities to foreign entities.

9   **SEC. 7. INDUSTRIAL BASE CONSIDERATIONS.**

10      As part of the acquisition process for the award of  
11 a contract for a replacement for the KC-135 tanker, as  
12 required by section 2(b), it is the responsibility of the De-  
13 partment of Defense to take into consideration the indus-  
14 trial base impacts and the economic impact to the United  
15 States of awarding contracts involving critical jobs to for-  
16 eign entities.

17   **SEC. 8. LOSS OF EMPLOYEE TAX REVENUE.**

18      As part of the acquisition process for the award of  
19 a contract for a replacement for the KC-135 tanker, as  
20 required by section 2(b), it is the responsibility of the De-  
21 partment of Defense to take into consideration the impact  
22 of lost personal income tax revenues to the United States,  
23 as a result of awarding defense contracts to foreign enti-  
24 ties.

1 **SEC. 9. LOSS OF CORPORATE TAX REVENUE.**

2 As part of the acquisition process for the award of  
3 a contract for a replacement for the KC-135 tanker, as  
4 required by section 2(b), it is the responsibility of the De-  
5 partment of Defense to take into consideration the impact  
6 of lost corporate tax revenues to the United States, as a  
7 result of awarding defense contracts to foreign entities.

8 **SEC. 10. REGULATORY BURDEN.**

9 As part of the acquisition process for the award of  
10 a contract for a replacement for the KC-135 tanker, as  
11 required by section 2(b), it is the responsibility of the De-  
12 partment of Defense to take into consideration the impact  
13 of all regulations waived or that are not applicable with  
14 respect to foreign entities. These regulations include cost  
15 accounting standards, Buy America provisions, specialty  
16 metal provisions, the Foreign Corrupt Practices Acts, and  
17 compliance with the International Traffic in Arms Regula-  
18 tion.

19 **SEC. 11. FOREIGN CORRUPT PRACTICES ACT.**

20 (a) CONDITION FOR PROSPECTIVE AWARD OF CON-  
21 TRACT.—

22 (1) IN GENERAL.—As part of the acquisition  
23 process for the award of a contract for a replace-  
24 ment for the KC-135 tanker, as required by section  
25 2(b), the Secretary of Defense and the source selec-  
26 tion authority shall require that any contractor or



1 subcontractor described in paragraph (2) that is not  
2 already covered by the Foreign Corrupt Practices  
3 Act shall be required, as a condition of the contract,  
4 to comply with the requirements of such Act.

5 (2) CONTRACTOR AND SUBCONTRACTORS DE-  
6 SCRIBED.—A contractor or subcontractor described  
7 in this paragraph is any of the following:

8 (A) A prospective defense contractor that  
9 is part of an internationally controlled group of  
10 entities.

11 (B) A prospective subcontractor that is  
12 part of an internationally controlled group of  
13 entities, provided that the subcontractor is at  
14 the second tier or higher and is to be used by  
15 the prospective defense contractor (as described  
16 in subparagraph (A)) to perform the contract.

17 (b) COMPLIANCE PROGRAM.—

18 (1) IN GENERAL.—With respect to compliance  
19 with the Foreign Corrupt Practices Act, the Sec-  
20 retary of Defense shall require that all contractors  
21 and subcontractors described in subsection (a)(2)  
22 have a compliance program and certify in writing  
23 that they have completed an audit of that compli-  
24 ance program.

25 (2) DEBARMENT.—

1 (A) IN GENERAL.—Any contractor de-  
2 scribed in subsection (a)(2) that engages in  
3 conduct that violates the requirements of the  
4 Foreign Corrupt Practices Act or any similar  
5 applicable laws in foreign countries shall be  
6 debarred from contracting with the Department  
7 of Defense.

8 (B) PERIOD OF DEBARMENT.—The period  
9 of debarment under subparagraph (A) shall be  
10 at least 3 years.

11 (c) NATIONAL SECURITY WAIVER AUTHORITY.—

12 (1) IN GENERAL.—The Secretary of Defense  
13 may waive the applicability of subsections (a) and  
14 (b) in specific instances if the Secretary determines  
15 that the waiver is necessary in the national security  
16 interests of the United States.

17 (2) NON-DELEGATION.—The Secretary of De-  
18 fense may not delegate the waiver authority under  
19 paragraph (1).

20 (3) NOTIFICATION.—Upon issuing a waiver  
21 under paragraph (1), the Secretary of Defense shall  
22 notify the appropriate Congressional committees in  
23 writing not later than 30 days after issuing such  
24 waiver.

25 (d) DEFINITIONS.—In this section:

1 (1) FOREIGN CORRUPT PRACTICES ACT.—The  
2 term “Foreign Corrupt Practices Act” means—

3 (A) section 30A of the Securities Exchange  
4 Act of 1934 (15 U.S.C. 78dd–1); and

5 (B) sections 104 and 104A of the Foreign  
6 Corrupt Practices Act of 1977 (15 U.S.C.  
7 78dd–2).

8 (2) INTERNATIONALLY CONTROLLED GROUP OF  
9 ENTITIES.—The term “internationally controlled  
10 group of entities” means a controlled group of enti-  
11 ties the common parent of which is a company orga-  
12 nized under the laws of a foreign government and to  
13 which the Foreign Corrupt Practices Act does not,  
14 by its jurisdictional terms, apply.

15 (3) APPROPRIATE CONGRESSIONAL COMMIT-  
16 TEES.—In this subsection, the term “appropriate  
17 Congressional committees” means—

18 (A) the Committee on Armed Services, the  
19 Committee on Appropriations, and the Perma-  
20 nent Select Committee on Intelligence of the  
21 House of Representatives; and

22 (B) the Committee on Armed Services, the  
23 Committee on Appropriations, and the Select  
24 Committee on Intelligence of the Senate.

1 **SEC. 12. COVERED CONTRACTOR DEFINITION.**

2 In this Act, the term “covered contractor”, with re-  
3 spect to a prime contract of the Department of Defense,  
4 means any of the following:

5 (1) CONTRACTOR AND SUBSIDIARIES AND AF-  
6 FILIATES.—

7 (A) Any prospective contractor making an  
8 offer for the contract.

9 (B) The contractor awarded the contract.

10 (C) Any subsidiary or affiliate of the con-  
11 tractor awarded the contract.

12 (2) SUBCONTRACTORS AND SUBSIDIARIES AND  
13 AFFILIATES.—

14 (A) Any subcontractor of a contractor de-  
15 scribed in paragraph (1)(B) that is at the sec-  
16 ond tier or higher and is to be used by the con-  
17 tractor in the performance of the contract.

18 (B) Any subsidiary or affiliate of any such  
19 subcontractor.

20 **SEC. 13. REPORT.**

21 (a) REPORT REQUIREMENT.—The Secretary of De-  
22 fense shall submit to the congressional defense committees  
23 a report on compliance by the Department of Defense with  
24 the provisions of this Act during the acquisition process  
25 for the award of a contract for a replacement for the KC-  
26 135 tanker, as required by section 2(b).

1       (b) DEADLINE.—The report shall be submitted no  
2 later than the date of award of such contract.

3       (c) CONGRESSIONAL DEFENSE COMMITTEES.—In  
4 this section, the term “congressional defense committees”  
5 means—

6           (1) the Committee on Armed Services and the  
7 Committee on Appropriations of the Senate; and

8           (2) the Committee on Armed Services and the  
9 Committee on Appropriations of the House of Rep-  
10 resentatives.

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